1 *Fairness*

I have distinguished the morality of reciprocal concern from the morality of direct concern. I have suggested that the morality of reciprocal concern finds application when what is at issue is the organization of a mutually beneficial arrangement of some sort, and I have said that I will focus on mutually beneficial cooperation. Fairness, reasonableness in the concession sense, and justice are central concepts of the morality of reciprocal concern. In this chapter, I develop an account of the first of these concepts, fairness.

The concept of fairness has received less discussion in the philosophical literature than the concept of justice. John Broome has provided one interpretation. For Broome, fairness consists in the satisfaction of claims in proportion to their strength, where a claim is a particular kind of reason that a good should be distributed to a person.[1] Broome's view has been criticized by Brad Hooker.[2] Hooker begins his discussion by mentioning two other conceptions of fairness. Formal fairness requires that rules be applied impartially and equally to each agent. And "broad" substantive fairness requires that all applicable moral reasons be appropriately accommodated. Hooker takes Broome to have proposed a narrower substantive view.

The interpretation of the concept of fairness that I offer here is also narrow and substantive. We should be clear about what this means. Perhaps the most familiar approach to fairness in the contemporary literature ties the concept to arbitrariness. Thus in *What We Owe to Each Other*, T. M. Scanlon says that policies that arbitrarily favor one person over others are in that respect unfair.[3] And Jonathan Wolff has

[1] John Broome, "Fairness," *Proceedings of the Aristotelian Society, New Series*, 91 (1990–1991), pp. 87–101.
[2] Brad Hooker, "Fairness," *Ethical Theory and Moral Practice* 8, No. 4 (2005), pp. 329–352. Broome's theory has also been criticized by Patrick Tomlin, "On Fairness and Claims," *Utilitas* 24 (2012), pp. 200–213.
[3] T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), p. 212.

examined the place of fairness, which he understands as "the demand that no one should be advantaged or disadvantaged by arbitrary factors," in egalitarian theories of justice.[4] We can speak here of fairness as nonarbitrariness (or unfairness as arbitrariness).

But when advantage and disadvantage are at issue, arbitrary factors are factors that lack a sound moral justification, and this can obscure an important point about our employment of the concept of fairness. Especially in political contexts, there are situations where it seems to make sense to say that moral considerations of other kinds trump fairness. Thus during the financial crisis that began in 2008, programs to aid homeowners who had taken out mortgages they could not afford were met with charges that they were unfair, presumably to responsible homeowners who could expect to receive no help with their mortgages. But it was argued in reply that the programs were nevertheless justified as preventing neighborhood blight and other social ills.[5] As a general rule, it is not difficult to find governmental policies that can be justified by moral considerations of a consequentialist sort, but that seem to involve treating some members of the relevant political unit unfairly. Decisions about where to locate a road or a power plant often have this character.

If fairness is nonarbitrariness, it does not appear that we can say these things. If the balance of moral reasons indeed justifies the policies, they are not arbitrary and thus not unfair. It follows that if we want to provide for the possibility that fairness can be outweighed by other values, we must understand the concept of fairness as identifying a substantive value in its own right, one that is capable of conflicting with other substantive values. If fairness is understood in the way I am going to propose, as appropriate concession in the context of a mutually beneficial cooperative arrangement, we can make a place for a broad concept of fairness that marks the justifiability of a particular pattern of concession in light of *all* relevant moral considerations. When a policy such as bailing out homeowners is justified, all things considered, it can be judged fair in this broad sense.[6] I say

[4] Jonathan Wolff, "Fairness, Respect, and the Egalitarian Ethos," *Philosophy and Public Affairs* 27 (1998), pp. 97–122, at 106.

[5] See, for example, William Yardley, "Foreclosure Aid Rising Locally, as Is Dissent," *The New York Times*, February 26, 2008.

[6] This is not precisely Hooker's broad fairness. Hooker speaks simply of the accommodation of all applicable moral reasons. Broad fairness as I understand it

more about this in Chapter 3. But it seems that we also need a narrower, substantive concept of fairness to mark the fact that in such cases, there is a sense in which fairness is being sacrificed to other considerations. The theory of fairness that I offer in this chapter is intended as an account of this narrower concept.

Mutual Benefit

The concept of fairness can be taken as marking the realization of the *full* potential for mutual benefit present in a mutually beneficial arrangement. To put it another way, the concept can be taken as identifying what makes a mutually beneficial arrangement *genuinely* mutually beneficial. An arrangement can be termed "mutually beneficial" in a minimal sense if the goals of the participants are satisfied at least as well as they would be if they withdrew and pursued their goals independently or joined different mutually beneficial arrangements. But the satisfaction of this minimal condition is compatible with large disparities in goal attainment. At the limit, a single participant could get the entire "cooperative surplus." If benefit is to be fully mutual, there must be a constraint of some kind on disparities of goal attainment. The concept of fairness marks such a constraint.

The most common mutually beneficial arrangements are cooperative. The participants consciously coordinate their actions so as to produce something that, given their disparate goals, will benefit all. Cooperation proceeds on the basis of a *cooperative scheme*, an understanding, which may be renegotiated as cooperation proceeds, of what each will do and of what each will get if everybody does what he or she is supposed to do. The discussion that follows focuses on the role of the morality of reciprocal concern in cooperative arrangements. It assumes that all humans whose motivational capacities are functioning properly will be cooperatively disposed. They will be disposed to act in the ways necessary to bring into existence mutually beneficial cooperation within groups of which they are members, provided enough other actual or potential participants possess this disposition as well. A cooperatively disposed person, so interpreted, will not take advantage of opportunities to ride free presented by the cooperative actions

adds the idea that what is justified by all applicable reasons is a pattern of concessions in a cooperative undertaking.

of others. The dispositions that I have associated with the morality of reciprocal concern, the disposition to respond to perceived disparities of concession by making or seeking corrective concessions, and the complementary disposition to resist further concession when concession is perceived as equal can be understood as components of a cooperative disposition.

The morality of reciprocal concern, and in particular the concept of fairness, can also play a role in connection with relations of affection, such as the relations among the members of a family. This was mentioned in the Introduction. Here too, we can speak of mutual benefit and of fairness and unfairness. But relations of affection, although they are mutually beneficial, are not best understood as consciously coordinated cooperative arrangements. Indeed, they can be corrupted if they take on this character.

Issues of appropriate concession can arise in connection with cooperative arrangements of all kinds, but political cooperation will receive special attention. I believe that political cooperation in a modern liberal polity is best understood as cooperation to promote the public good, where the members of the polity reasonably disagree about the public good and thus hold different conceptions of it. When political cooperation in a modern liberal polity is viewed in this way, the cooperative scheme is specified by the official directives of the state, its laws and regulations, and implementing a given scheme will require the members of the state to make concessions from the full realization of their particular conceptions of the public good. The concepts of fairness, justice, and reasonableness in the concession sense govern these concessions. These points, too, are discussed in more detail in Chapter 3.

The Concept of Fairness

I have said that I shall be concerned with the concept of fairness as it is employed in the context of mutually beneficial arrangements that are cooperative. A party to a mutually beneficial cooperative arrangement will typically have goals that are not fully shared by the other parties. The parties cooperate because, in the situation that obtains, each can achieve her goals more effectively by acting in concert with the others than by proceeding independently. As was mentioned in the previous section, to count as mutually beneficial, a cooperative arrangement must satisfy a certain minimal condition. All the participants must do

at least as well, by reference to the goals they have in participating, as they could by participating in some other arrangement, or by acting independently. But the satisfaction of this condition is compatible with large differences in goal attainment beyond this minimum.

The point here can be made more precise as follows. For each participant in a cooperative arrangement, we can identify a maximal benefit from participation, consisting in the degree of goal attainment he could realize through participation if the others received only their minimums. Organizing cooperation in one of these ways would satisfy the minimal condition for mutual benefit, but in most cases, there would be an important sense in which the arrangement nevertheless failed to be *mutually* beneficial. If there is to be genuine mutual benefit, the parties must more fully accommodate each other's goals. The concept of fairness can be understood as capturing this further dimension of mutual accommodation.

This leaves us with the question of what form mutual accommodation should take. The idea that fairness is a concept of the morality of reciprocal concern can help us here. Reciprocation is returning benefit for benefit; it is benefiting those who have benefited us. Generally speaking, a participant in a cooperative arrangement that is genuinely mutually beneficial benefits the other participants by accepting in "payment" for his contribution less than his maximum – by accepting a degree of goal attainment lower than his maximum – so that others can receive more. We can put this by saying that a participant in a cooperative arrangement that is genuinely mutually beneficial benefits the other participants by making a concession from the maximum degree of goal attainment that would be possible for him, consistent with the receipt of minimums by the others.

The others reciprocate by doing the same. Each makes a concession from the maximum degree of goal attainment that would be possible for him or her given the receipt by the others of their minimums. We thus get the result that where benefit is genuinely mutual, the participants bring into existence an appropriate pattern of concessions from their maximums. That is, fairness in the context of a cooperative arrangement consists in *appropriate concession* among the participants in the arrangement.

Appropriate concession might be interpreted in a number of different ways. But if the concept of fairness is to identify a specific, ground-level, substantive moral value, this appropriateness cannot be derived from

other moral values in the way that "fairness as nonarbitrariness" supposes. It must be understood to consist in the possession by a pattern of concessions of an otherwise morally neutral descriptive feature. What might this be?

We can make progress by focusing on *unfairness*. As Mill says of justice, fairness "is best defined by its opposite."[7] Judgments of unfairness typically mark (what are taken to be) *disparities* of concession. An arrangement is judged unfair when concession is perceived to be unequal. Often when the parties to a cooperative arrangement seek to establish what would constitute a fair way of organizing it, they begin by taking note of the disparities of concession that are, or would be, associated with particular forms of organization, and then consider what would be required to eliminate them. In this respect, the sense of fairness is, in the first instance, a sense of unfairness. It responds to perceived disparities of concession, seeking their elimination.

Taking the thinking we do about fairness to be focused initially on perceived disparities of concession better reflects the concept of reciprocation, the return of good for good. An individual who makes a contribution to a cooperative undertaking, thereby benefiting the other members, introduces into the undertaking what will be a disparity of concession unless the others make, through their own contributions, reciprocal concessions. And if the others reciprocate in this way, they will promote fairness by eliminating the disparity of concession that would otherwise have existed. Disparities of concession and their elimination will play an important role in the constructivist account of judgments of fairness that follows.

It might be objected that in many cooperative contexts, we are prepared to accept the idea that inequalities can be fair. I believe, however, that when we encounter such a situation, the judgment of fairness is still grounded in some way in an understanding of equal concession. To take one example, in some cooperative contexts, we are comfortable with the conclusion that it is fair for participants who have worked harder to receive more of what the undertaking produces. But in such cases we, I think, typically suppose that these people have incurred greater costs. Given these costs, an unequal distribution of the collective product can be understood as securing equal concession

[7] John Stuart Mill, *Utilitarianism*, O. Piest, ed. (Indianapolis: Bobbs-Merrill, 1957), p. 53.

in goal-attainment terms. These cases are discussed at greater length in the "Desert" section of this chapter.

I have proposed that fairness be understood as appropriate concession from the maximum degree of goal attainment that each participant could obtain, given the receipt by the others of their minimums. Why not understand fairness instead as appropriate *gain* from each participant's minimum? Rawls might be invoked here. He makes a distinction between reciprocity and mutual advantage in cooperative contexts. He understands mutual advantage as mutual benefit relative to a starting point provided by the actual situation, while reciprocity is mutual benefit relative to a starting point provided by an appropriate benchmark of equality.[8]

The minimums that, I have suggested, each must receive if all are to find participation in a given cooperative arrangement worthwhile can be understood as constituting starting points provided by the actual situation. It might thus seem that fairness, as I have interpreted it, should be understood as a form of Rawlsian mutual advantage, which he evidently regards as morally inferior to (what he terms) reciprocity. If the benchmark of equality by reference to which Rawlsian reciprocity is defined really is appropriate – if the equality in question is equality in some morally appropriate respect – mutual benefit relative to the benchmark will inherit this appropriateness. Benefit relative to the benchmark need not be equal. In Rawls's theory of justice, the benchmark is provided by an equal distribution of resources of a certain kind, social primary goods. But his difference principle, which presumably captures what Rawlsian reciprocity requires in the distribution of monetary resources, allows some to receive larger monetary shares than others.

I have developed my interpretation of the concept of fairness as appropriate concession by considering how reciprocation for benefits received in the context of a mutually beneficial cooperative arrangement should be understood. Reciprocation consists in responding to the contributions of others in a way that corrects disparities of concession that would otherwise be created by these contributions. I am, then, proposing an alternative to Rawlsian reciprocity. I believe that interpreting reciprocity in the context of mutually beneficial cooperative

[8] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 16–17 and 50.

arrangement as the correction of actual disparities of concession, or the prevention of threatened disparities of concession, more clearly accords with the core idea of reciprocity – the return of good for good – than Rawls's proposal.

It might be argued that Rawls's proposal is nevertheless preferable since his benchmark of equality, assuming that it is appropriate, will not be morally arbitrary, whereas the maximums and minimums that play an essential role in my proposal seem to be morally arbitrary. The minimums that the participants must receive to make their participation worthwhile will be affected by contingent features of particular cooperative contexts, including opportunity costs of participation, and the maximums are defined by reference to these minimums.

One reason I have chosen to proceed as I have is that I want to understand the concept of fairness in a way that makes possible judgments of fairness and unfairness about cooperative arrangements of all kinds, which can range from camping trips to political societies. In many of these, it is not clear what would constitute a benchmark of equality of the sort required for Rawlsian reciprocity. In the context of Rawls's discussion, the benchmark is provided by an equal distribution of social primary goods, but the distribution of such goods will not be at issue in many cooperative contexts. It thus seems that if we want a general concept that marks benefit that is fully mutual in a cooperative arrangement, we need to move beyond Rawlsian reciprocity.

Rawls's benchmark is one of equality. On the view I have proposed, fairness requires one kind of equality, equal concession, but the moral significance of any other kinds of equality will be understood by reference to the value of fairness. Equality in other respects is important when and only when inequality would be *unfair*. If, as I am going to argue, fairness has a history, it follows that equality as a moral ideal – the equalities and inequalities that have moral importance – will have a history as well.

This seems to leave us with the problem of moral arbitrariness. Contingent facts still seem to play a role in establishing what constitutes equal and unequal concession. I believe, however, that the constructivist theory of judgments of fairness and unfairness that I am going to propose provides an adequate solution to this problem. The process of construction is historical in character. Judgments of fairness and unfairness respond to perceived equalities and disparities

of concession. But what is understood to constitute an equality or disparity of concession in a given community at a given time is influenced by what was understood to constitute an equality or disparity in that community at an earlier time. Basically, judgments of fairness and unfairness made at a given time *update* previous understandings of fairness and unfairness in ways that are necessary to preserve the proper functioning, in new situations, of the mental capacities underlying the sense of fairness. This process of updating has the effect over time of purging moral arbitrariness from judgments of fairness and unfairness. I say more about this in Chapter 5.

Disparities of Concession

I have proposed interpreting the concept of fairness, as it finds application in connection with mutually beneficial cooperative arrangements, as appropriate concession. I have also argued that appropriate concession should be understood as equal concession, and I have suggested that thinking about fairness often approaches equal concession indirectly, via the correction of perceived disparities of concession. But how are disparities of concession to be understood?

In discussing this question, it will be useful to have an example of a mutually beneficial cooperative arrangement that is larger and more enduring than a camping trip but smaller than a political society. Robert Nozick's case of the neighborhood entertainment system will do.[9] In this case, the residents of a neighborhood set up loudspeakers to pipe music and other entertainment to the neighborhood, with all taking turns as announcers. Nozick constructs this case to criticize the so-called principle of fairness, which states that when one has voluntarily accepted the benefits of a mutually beneficial arrangement, one has a moral obligation to do one's fair share in maintaining it, but we can leave this complication aside.[10] For present purposes, we can simply suppose that all the residents of the neighborhood take their

[9] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 93–94.

[10] The principle was first formulated by H. L. A. Hart in "Are There Any Natural Rights," *Philosophical Review* 64 (1955), pp. 175–191. It reads: "When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions have a right to a similar submission from those who have benefitted by their submission" (p. 185).

designated turns as announcers, and by so doing bring into existence a public good. The concession that each resident makes by participating will be determined by the extent to which he or she can, in goal-attainment terms, regard the sacrifices involved as offset by the benefit he or she derives from the public good.

Given that concession is understood in this way, in what do disparities of concession consist? I do not believe that there is a single correct answer to this question. One possibility can be extracted from the earlier discussion of maximum and minimum levels of goal attainment, on the assumption that the goals of the participants permit the definition of a utility function of the usual sort, a measure on an interval scale of relative preferability. Label participant A's maximum as MAX_A, her minimum MIN_A, and the utility she will receive from the adoption of the scheme in question S_A. The degree of the concession that A will be making if S is adopted will then be $(MAX_A - S_A)/(MAX_A - MIN_A)$. Degrees of concession, so understood – degrees of relative concession – will be represented by numbers between 0 and 1, and there will be disparities of concession if these numbers are unequal. David Gauthier's discussion of rational bargaining in *Morals by Agreement* takes a similar approach to measuring concession.[11]

To establish disparities of concession in this way, we must be able to identify, for each person, a minimum level of preference satisfaction that would make participation worthwhile. Gauthier's general theory of moral constraint does this by positing an initial bargaining position in which no one has bettered his or her situation, prior to cooperation, through worsening the situation of others. But we are seeking a theory of fairness for actual cooperative endeavors, which, as has been noted, can range from camping trips to political societies.

In many such endeavors, the minimum will be determined by the opportunity cost of participating. Each must receive at least as much as she could obtain by using in some alternative way the resources she has available to contribute. The question whether opportunity costs of participation should be taken into account can itself raise issues of fairness, however. The fact that some have more attractive alternative opportunities can sometimes be taken as an indication of unfairness in a further,

[11] David, Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986), chap. V. In Gauthier's theory, the agreement that establishes moral constraint institutes minimax relative concession, but he says that in most cases, minimax relative concession will be equal concession.